

**BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA**

IN THE MATTER OF:

SURFACE WATER EMERGENCIES) Administrative Cause
ON PUBLIC FRESHWATER LAKES,) Number: 09-176W
RELOCATION TO 312 IAC 11.5,)
REPEALING 312 IAC 11-6) (LSA Document #09-876(F))

**RULE PROCESSING, REPORT OF PUBLIC HEARING
AND RECOMMENDATION FOR FINAL ADOPTION**

1. RULE PROCESSING

For consideration is a rule amendment to relocate surface water emergency standards from 312 IAC 11-6 to 312 IAC 11.5. The proposed relocation to 312 IAC 11.5 would reduce the likelihood of confusion to citizens by separating its provisions from those pertaining exclusively to “public freshwater lakes”. Although IC 14-25-5 is not disqualified from application to a “public freshwater lake” governed by IC 14-26-2 (sometimes referred to as the “Lakes Preservation Act”), the historic and likely future application is mostly to small private lakes. The amendment would also make the rule more identifiable in the Indiana Administrative Code. The current location of 312 IAC 11-6 causes anyone but the most committed researcher to assume it assists with implementation of the Lakes Preservation Act. In at least one instance, an attorney confused the provisions of 312 IAC 11-6 with standards applicable to public freshwater lakes. A few technical changes are also made within the rule to make its sequence fit more closely to Legislative Service Agency format and by explicitly cross-referencing an enforcement tool; however, no substantive changes are made. The proposal is a housekeeping measure.

The Natural Resources Commission gave preliminary adoption to the rule proposal during its November 17, 2009 meeting. As reported in the pertinent portions of the minutes:

Steve Lucas, Director of the Commission’s, Division of Hearings, introduced this item. He said the proposed rule is “mostly a housekeeping measure and would assist in the administration of what is sometimes referred to as the ‘Surface Water Emergency Lakes Act.’” The proposal would “relocate existing rules at 312 IAC 11-6, which govern the emergency regulation of surface water rights, to be codified at 312 IAC 11.5. He said the existing language is included within rules which otherwise assist with implementation of the Lakes Preservation Act, and this location has caused notable public confusion. He

added that “water rights is a growing area of the law that really thus far the Commission and its AOPA Committee has had fairly limited exposure, but I think that will change in the future.” Lucas then introduced Mark Basch, Section Head of the Water Rights and Use Section of the Division of Water.

Mark Basch explained the proposed rule’s enabling statute provides protection to owners of freshwater lakes against the impacts of nearby “high capacity” pumping operations that might substantially lower lake levels and result in “significant environmental harm.” He said the rule is “very similar” to regulations governing ground water rights that protect small capacity wells from the impacts of high capacity pumping. He said “freshwater lake” is defined as “being at least ten acres in size and...constructed originally to retain water” along with other provisions.

Basch reported the Surface Water Rights Act has been in effect since 1990. The Department has “only had a handful of investigations, mainly because the provision that [the lake] has to be ten acres in size prohibits a lot of the complaints or discounts them. Most of the time, [the bodies of water] are smaller ponds.” Some complaints that are governed by the rule have been resolved “somewhat voluntarily” by restriction of pumping by the high capacity facility.

Basch said moving the rule to 312 IAC 11.5 “makes sense and is prudent” because of its similarity to the groundwater rights rule, which is codified at 312 IAC 12. He then recommended preliminary adoption of the proposed rule.

Larry Klein moved to give preliminary adoption to proposed amendments to surface water emergency standards to relocate rules from 312 IAC 11-6 to 312 IAC 11.5. Thomas Easterly seconded the motion. Upon a voice vote, the motion carried.

A “notice of intent” to adopt the proposed rule amendments was published in the Indiana REGISTER on November 11, 2009 as LSA Document #09-876. The notice identified Mark Basch, Section Head, Water Rights and Use of the DNR’s Division of Water, as the “small business regulatory coordinator”.

As specified by Executive Order, proposed fiscal analyses of the rule proposal were submitted to the Office of Management and Budget on December 15, 2009. In a July 16, 2010 letter, OMB approved the proposed fiscal analyses.

On July 26, 2010, the Division of Hearings submitted a copy of the proposed rule and corresponding “Economic Impact Statement” to the Legislative Services Agency. On July 28, LSA provided an intended date of posting of August 11, 2010, and on the same day, the Division of Hearings provided LSA with a “Notice of Public Hearing” (with a “Justification Statement”). Later on July 28, LSA issued to the Commission an “authorization to proceed” with the rule

proposal.

A public hearing on the rule proposal was scheduled for September 3, 2010 in the Division of Hearings Office, Indiana Government Center North, 100 North Senate Avenue, Room N501, Indianapolis, Indiana. Notice of the public hearing and the text of the proposed amendments were posted in the Indiana REGISTER on August 11, 2010. This notice included the statement under IC 4-22-2.1-5 concerning rules affecting small businesses. The notice also included information required under IC 4-22-2-24. Notice of the public hearing with similar information was published on August 4, 2010 in the Indianapolis DAILY STAR, a newspaper of general circulation published in Marion County, Indiana. In addition, notice of the public hearing and a summary of the proposed rule changes were published on the calendar of the Commission's website.

2. REPORT OF PUBLIC HEARING AND COMMENTS

A. Report of Public Hearing

The public hearing was convened as scheduled in Division of Hearings Office, Indiana Government Center North, 100 North Senate Avenue, Room N501, Indianapolis, Indiana. Appearing as representative of the Department of Natural Resources, Division of Water was Mark Basch, Section Head, Water Rights and Use. No other persons were present or otherwise commented on the proposal.

3. RECOMMENDATION FOR FINAL ADOPTION

The proposed rules as published for preliminary adoption, and as included in Exhibit "A", appear to be lawful and ripe for final adoption.

The governing statute (IC 14-25-5) is an infrequently applied but important protection for owners along lakes ten acres or larger where the lakes are adversely impacted by the operation of a significant water withdrawal facility (one capable of withdrawing at least 100,000 gallons of water daily). The current rule (312 IAC 11-6) is placed at the tail end of a multi-part rule (312 IAC 11-1 through 312 IAC 11-5), which exclusively addresses public waters that are "public freshwater lakes". Although a public freshwater lake could qualify for relief under IC 14-25-5,

the more likely application is to a small private lake.

The current location of 312 IAC 11-6 has two negative consequences. First, on several occasions the rule has muddled and complicated litigation pertaining to public freshwater lakes. In at least one instance, a litigant argued during DNR licensure, on administrative review to the Natural Resources Commission, and in a Circuit Court that language in the rule created ambiguities to the application of laws governing public freshwater lakes. Although the argument was ultimately unsuccessful, the litigation was lengthy and expensive. In other instances, the positioning of 312 IAC 11-6 had less cumbersome consequences but caused confusion among regulated citizens. Second, the location of 312 IAC 11-6, at the end of extensive rules pertaining to public freshwater lakes, makes it difficult to find for genuinely affected persons.

The proposed relocation to 312 IAC 11.5 would eliminate confusion by separating its provisions from those pertaining to public freshwater lakes and would make the rule more-readily identifiable. Proposed 312 IAC 11.5-2(2) includes a cross-reference to an enforcement option that is not currently specified. A few technical changes are made within the rule to make its sequence fit LSA format. Proposed 312 IAC 11-5 is not believed to be substantively different from the existing rule, 312 IAC 11-6, which is proposed for repeal.

To avoid the confusion that can arise from a summer amendment to rules affecting lakes, the hearing officer recommends deferral of the effective date of the amendments until January 1, 2011.

With this background, Exhibit “A” is presented for consideration as to final adoption.

Dated: September 3, 2010

Jennifer M. Kane
Hearing Officer

“EXHIBIT A”

TITLE 312 NATURAL RESOURCES COMMISSION

Final Rule
LSA Document #09-876(F)

DIGEST

Adds 312 IAC 11.5 to govern the emergency regulation of surface water rights on freshwater lakes that contain at least 10 acres and to provide that the director of the Division of Water may file with the Natural Resources Commission a complaint for a notice of violation under IC 14-10-2-6. Makes other technical changes. Repeals 312 IAC 11-6. Effective January 1, 2011.

312 IAC 11-6; 312 IAC 11.5

SECTION 1. 312 IAC 11.5 IS ADDED TO READ AS FOLLOWS:

ARTICLE 11.5. SURFACE WATER EMERGENCIES ON LAKES

Rule 1. Administration and Enforcement

312 IAC 11.5-1-1 Administration

Authority: IC 14-10-2-4

Affected: IC 14-25-5-15

Sec. 1. The division shall administer and coordinate the professional and technical functions required of the department under IC 14-25-5 and this rule. (*Natural Resources Commission; 312 IAC 11.5-1-1*)

312 IAC 11.5-1-2 Enforcement

Authority: IC 14-10-2-4

Affected: IC 4-21.5-3-8; IC 14-10-2-6; IC 14-25-5-15

Sec. 2. To enforce IC 14-25-5 or this article on behalf of the commission:

(1) The director may initiate an action under IC 14-25-5-15(b) to enjoin a violation.

(2) The division director may, under IC 4-21.5-3-8, file with the commission a complaint for a notice of violation under IC 14-10-2-6.

(*Natural Resources Commission; 312 IAC 11.5-1-2*)

Rule 2. Definitions

312 IAC 11.5-2-1 Applicability

Authority: IC 14-10-2-4

Affected: IC 14-8; IC 14-25-5

Sec. 1. The definitions in IC 14-8, 312 IAC 1, and sections 2 through 9 of this rule apply throughout this article. (*Natural Resources Commission; 312 IAC 11.5-2-1*)

312 IAC 11.5-2-2 "Cumulative effect" defined

Authority: IC 14-10-2-4

Affected: IC 14-25-5

Sec. 2. "Cumulative effect" means the impact of multiple significant water withdrawal facilities. *(Natural Resources Commission; 312 IAC 11.5-2-2)*

312 IAC 11.5-2-3 "Division" defined

Authority: IC 14-10-2-4

Affected: IC 14-8; IC 14-25-5

Sec. 3. "Division" means the division of water of the department. *(Natural Resources Commission; 312 IAC 11.5-2-3)*

312 IAC 11.5-2-4 "Extraordinary or unique natural resource" defined

Authority: IC 14-10-2-4

Affected: IC 14-25-5; IC 14-29-6; IC 14-31-1

Sec. 4. "Extraordinary or unique natural resource" means a natural resource that is exceptional to a very marked extent within Indiana and includes the following:

(1) A plant or animal that is a rare, threatened, or endangered species.

(2) A waterway located within one-half (1/2) mile of a freshwater lake and determined by the department to qualify as a natural river or a scenic river under IC 14-29-6 and 312 IAC 7-2.

(3) A nature preserve dedicated under IC 14-31-1.

(Natural Resources Commission; 312 IAC 11.5-2-4)

312 IAC 11.5-2-5 "Financial responsibility bond" defined

Authority: IC 14-10-2-4

Affected: IC 14-25-5

Sec. 5. "Financial responsibility bond" means any of the following:

(1) A surety bond.

(2) A certificate of deposit.

(3) A cashier's check.

(4) A letter of credit.

(Natural Resources Commission; 312 IAC 11.5-2-5)

312 IAC 11.5-2-6 "Freshwater lake" defined

Authority: IC 14-10-2-4

Affected: IC 14-25-5

Sec. 6. (a) "Freshwater lake" means a body of standing surface water that contains at least ten (10) acres at the body of water's normal level and:

(1) is of natural origin; or

(2) was originally constructed to permanently retain water and was in existence at least five (5) years before the commencement of water withdrawals by a significant water withdrawal facility.

(b) The term does not include Lake Michigan. *(Natural Resources Commission; 312 IAC 11.5-2-6)*

312 IAC 11.5-2-7 "Lake owner" defined

Authority: IC 14-10-2-4

Affected: IC 14-25-5

Sec. 7. "Lake owner" means a person in possession of property that includes a physical part of, or a legal interest in, a freshwater lake. (*Natural Resources Commission; 312 IAC 11.5-2-7*)

312 IAC 11.5-2-8 "Significant environmental harm" defined

Authority: IC 14-10-2-4

Affected: IC 14-25-5

Sec. 8. "Significant environmental harm" means damage to natural or cultural resources, the individual or cumulative effect of which is found by the director to be obvious and measurable (based upon the opinion of a professional qualified to assess the damage) and that:

(1) creates a condition where recovery of affected resources is not likely to occur within an acceptable period; and

(2) cannot be adequately mitigated through the implementation of a mitigation plan approved by the director.

(*Natural Resources Commission; 312 IAC 11.5-2-8*)

312 IAC 11.5-2-9 "Significant water withdrawal facility" defined

Authority: IC 14-10-2-4

Affected: IC 14-25-5

Sec. 9. "Significant water withdrawal facility" means a water pumping installation or other equipment of a person that, in the aggregate from all sources and by all methods, has the capability of withdrawing at least one hundred thousand (100,000) gallons of water in one (1) day. (*Natural Resources Commission; 312 IAC 11.5-2-9*)

SECTION 2. 312 IAC 11-6 IS REPEALED.

SECTION 3. SECTIONS 1 and 2 of this document take effect January 1, 2011.